IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07/09/2004

CORAM:

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN

T.C.No.86 of 2000
and
T.C.No.214 of 2000

The Commissioner of Income-Tax
Tamil Nadu III, Madras. .. Appellant

-Vs-

A.Radhakrishnan .. Respondent

PRAYER: Tax case reference under Section 256(2) of the Income Tax Act referred by the Income Tax Appellate Tribunal, 'B' Bench, Madras, in R.A.Nos.656 and 657/Mds/ 1993 (I.T.A.Nos.2195 and 2438/Mds/1992) for the assessment year 1988-89 and 1989-90.

!For Appellant : Mr.J.Narayanasamy
Standing Counsel for
Income Tax Department

^For Respondent : ..Nil..

:JUDGMENT

(Judgment of this Court was delivered by
K.RAVIRAJA PANDIAN.J)

Pursuant to the orders of this Court dated 24.8.1998, the Income Tax Appellate Tribunal, 'B' Bench, Madras has made a statement of case to this Court by raising the following question of law for our answer:

"Whether, on the facts and in the circumstances of the case, the Appellate Tribunal was right in law and had valid materials in holding that the assessee had transferred only the lodging business to the trust and hence the transfer is not hit by the provisions of Section 60 , even though the property with which the lodging business was done has not been transferred by the assessee to the Trust?"

2. The assessee, an individual, is the owner of a building situated

at No.5A (Old No.6), Lakshmikanthan Street, Thyagaraja Nagar, Madras. The building comprises of 40/41 single cot residential rooms and 40 /41 double cot residential rooms with other facilities. For the assessment year 1988-89 and 1989-90, the assessee made a claim before the Assessing Officer to the effect that by a gift deed dated 18.6.1986, he had gifted the income from the said mansions to one "M/s.Poonga Educational and Charitable Trust" and hence, no part of the income from the said mansions was chargeable to tax in his hands. The claim of the assessee has been negatived by the Assessing Officer by referring Section 60 of the Income Tax Act and brought to tax in the hands of the assessee the income from the said mansions for the two assessment years referred to above.

3. On appeal, the Commissioner of Income Tax (Appeals) confirmed the the order of the Assessing Officer. On further appeal, the Appellate Tribunal held that although the property with which the business of lodging is continued has not been transferred, the assessee had transferred to the trustees the business of running the lodging house and since the business itself which is the capital asset has been transferred to the Trust, the transfer made by the assessee is not hit by the provisions of Section 60 of the Income Tax Act and in that view of the matter, the Appellate Tribunal deleted the income earned from the property at the hands of the assessee.

4. In the above said factual matrix, at the instance of this Court, the Tribunal framed the question of law and referred the matter.

5. The learned counsel for the revenue submitted that what was transferred in favour of the Educational Charitable Trust was only the income from the property, and the income earning property, viz., source of income, has not been transferred, and as such, it is hit by Section 60 of the Income Tax Act. The reasoning of the Appellate Tribunal for reversing the orders of the authorities below is not correct. He also relied on the decisions in
(i) COMMISSIONER OF INCOME TAX v. SMT.P.ANDAL AMMAL AND ANOTHER, [20 00] 243 ITR 715; and
(ii) COMMISSIONER OF INCOME TAX v. SUNIL J.KINARIWALA, [2003] 259 ITR 10.

6. The decision in COMMISSIONER OF INCOME TAX v. SMT.P.ANDAL AMMAL AND ANOTHER, referred supra, was from a case where the assessee was a co-owner of a lodging house having one-third share therein and she along with other two owners of the property let out the lodging house to a firm styled L in which one of the co-owners of the property, namely, A, was a partner. The claim of the assessee was that the entire income derived from the lodging house by way of letting out the same should be assessed under the head "Income from other sources". The Assessing Officer as well as the First Appellate Authority rejected her claim and held that a portion of the income referable to and derived from the letting out of the property should be charged under the head "Income from house property" and the income referable to the use of amenities provided in the lodge should be charged under the head "Income from other sources". On the above said facts and circumstances, the Court held that though there were two separate leases in respect of furniture and buildings both the species of property were enjoyed on payment of one lumpsum which gave an indication that the letting of building and furniture was one letting and a

single indivisible transaction. Hence, the entire rent from such composite letting was chargeable under the head "Other sources".

7. The other decision of the Supreme Court, relied on by the learned counsel for the revenue, is one rendered in the case of COMMISSIONER OF INCOME TAX v. SUNIL J.KINARIWALA, referred supra. That was a case in which the Supreme Court reversed the decision of the High Court holding that there was a clear distinction between a case where a partner of a firm assigns his hare in favour of a third person and a case where a partner constitutes a sub-partnership with his share in the main partnership. Whereas, in the former case, in view of Section 29(1) of the Indian Partnership Act, 1932, the assignee gets no right or interest in the main partnership, except of course, to receive that part of the profits of the firm referable to the assignment and to the assets in the event of dissolution of the firm, in the latter case, the sub-partnership acquires a special interest in the main partnership. Though, in view of Section 29(1) of the Partnership Act, the trust, as an assignee, became entitled to receive the assigned share of the profits from the firm, it received the share of profits not as a sub-partner, because no sub-partnership came into existence, but as an assignee of the share of income of the assignor-partner. There was no diversion of income by overriding title. The share of the income of the assessee assigned to the trust had to be included in the income of the assessee.

8. The learned counsel for the revenue is not able to satisfy us as to how the above said two decisions apply to the facts and circumstances of the present case.

9. On the contrary, the Supreme Court in DALMIA CEMENT LTD. v. COMMISSIONER OF INCOME TAX, [1999] 237 ITR 617 = AIR 1999 SC 2154, after referring the provisions of Sections 60 and 63 of the Income Tax and having regard to the special definition made under Section 63(b) of the Income Tax as to what is meant by transfer of assets in respect of Sections 60, 61 and 62 of the Income Tax Act, held that Section 60 of the Income Tax Act has its applicability only to the case where the income accrues to the transferee but the income earning assets or source of income remains with the transferor. Section 63 of the Income Tax Act contains a rather special definition of "transfer" for the purpose of Sections 60 to 62 of the Income Tax Act, and, inter alia, includes an "agreement" and in the referred case, there existed an agreement to transfer and because of the existence of that agreement to transfer, the Supreme Court held that the applicability of Section 60 of the Income Tax Act is ruled out and totally excluded.

10. The principle laid down in DALMIA CEMENT LTD. v. COMMISSIONER OF INCOME TAX, referred supra, is squarely applicable to the facts and circumstances of this case, as in the case on hand also, apart from the factum of transfer of income to the Educational and Charitable Trust, there exists an agreement in respect of the relevant assessment years in favour of the trust to manage the property in question and receive the rent from that property and utilise the same for the purpose of the Educational and Charitable institution.

11. The learned counsel for the revenue, incidentally, raised an argument that the agreement is only for ten years and that would not by itself constitute a absolute transfer. We are unable to accept his contention as there is no provision to require for absolute transfer, as argued by the learned counsel for the revenue either in Section 60 or Section 63 of the Income Tax, which defines the word "transfer".

In view of the above reasoning, the question of law referred to us has to be answered in affirmative against the revenue and in favour of the assessee. The reference is thus answered and returned.

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